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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

NO. 809

JOSEPH TOMLEY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Joseph Tomley, petitioner in the above-styled case, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above case, and respectfully shows:

OPINION IN COURT BELOW

The opinion of the court below (R. 573-) has not been officially reported, and the original opinion, dated Dec. 26, 1957, is reproduced in the Appendix to this petition. There was no opinion of the court below on the denial of petitioner's motion for rehearing, but the same was denied without opinion on January 30, 1958.

JURISDICTION

The judgment of the court below was entered on December 26, 1957, on the original appeal of the case to that court, and such court denied petitioner's motion for rehearing in the case, without an opinion, on January 30, 1958.

The statutory provision invoked to confer on this Court jurisdiction to review the judgment in this case is 28 USC, Sect. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

(1) Did the United States Court of Appeals for the Fifth Circuit err in holding that the requirement of Rule 30, Federal Rules of Criminal Procedure, [providing that no party may assign as error any omission from the court's charge (in this case, failure to charge timely written requests to charge) unless he states the particular grounds of his objection,] is not met when objections are duly made to the trial court's failure to so charge and the trial court in substance rules that no more need be said as to the grounds of objection, as was done in this case, in view of the fact that the reported decisions are unanimous that such particularity is for the benefit of the trial court?

(2) Did the United States Court of Appeals for the Fifth Circuit err in holding that an erroneous charge of the court, as applied to the circumstances of this case, on the substantive defense of good character of the defendant was not such an error under Rule 52 (b), Federal Rules of Criminal Procedure, that the appellate court should notice such erroneous charge in the absence of objection, pursuant to Rule 30, Federal Rules of Criminal Procedure?

(3) Did the Circuit Court of Appeals for the Fifth Circuit err in holding that *no* corroboration of an accomplice's testimony was necessary?

STATUTES INVOLVED

Two rules of the Federal Rules of Criminal Procedure are involved in this case, as follows:

"Rule 30. Instructions.

" . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objections out of the hearing of the jury."

Rule 30, *Federal Rules of Criminal Procedure, Title* 18 *USCA, p.* 309

"Rule 52. Harmless Error and Plain Error.

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed that were not brought to the attention of the court."

Rule 52(*b*), *Federal Rules of Criminal Procedure Title* 18 *USCA, p.* 548.

STATEMENT OF THE CASE

Petitioner, a businessman dealer in war and armed services surplus material, was tried before the United States District Court for the Middle District of Georgia, Macon Division and a jury on a seven-count criminal indictment, charging him with a conspiracy to violate 18 USC, Sect. 641 and with six separate substantive counts of violation of 18 USC, Sect. 641. (R. 2).

One Andrew Jackson Wright was indicted in the same indictment with petitioner, Wright being indicted on the conspiracy count and on two substantive counts of violation of 18 USC, Sect. 641, separate and distinct from those charging petitioner (R. 2). Petitioner was acquitted of four substantive counts by direction of the trial court and acquitted by the jury of the remaining substantive counts and found guilty on the conspiracy count, and a sentence of three years in the penitentiary was imposed (R. 11; 549).

Andrew Jackson Wright, a civilian employee of Warner Robins Air Materiel Area, Macon, Georgia, pleaded guilty to all three counts charged against him and turned "State's evidence" against petitioner (R. 10; 19).

The testimony of Accomplice Wright was the only evidence upon which a verdict of guilty would be authorized. (This is assuming that the rule of the United States Court of Appeals for the Fifth Circuit is correct, that an accomplice's testimony needs no corroboration to authorize conviction.) Certain written requests to charge were timely submitted to the court pertaining to the testimony of Accomplice Wright, which were not given in charge: such requests, for the convenience of the Court, are set out as follows:

"(1) Further, in connection with the contention of the Government that A. J. Wright was an accomplice of the defendant, I charge you that you would not be authorized to convict the defendant on the testimony of Wright *alone*, unless you find and determine that Wright's testimony produced the fullest and most positive conviction of the truth, and from Wright's testimony you are satisfied to a moral and reasonable certainty, and beyond a reasonable doubt, of the guilt of the defendant. (emphasis added)

"(2) I charge you that an accomplice is a competent witness; but unless the testimony of an accomplice is corroborated, a jury should rarely, on the testimony of an accomplice *alone*, convict a defendant, unless the jury, after receiving and weighing the testimony of an accomplice with extreme caution and scrutinizing it with great care and suspicion, concludes that the accomplice's testimony produces the fullest and most positive conviction of the truth, and are satisfied to a moral and reasonable certainty, and beyond a reasonable doubt, that the defendant on trial is guilty. (emphasis added)

"(3) I charge you that in cases where an accomplice testifies against a defendant on trial, a jury should not place too much reliance on the testimony of an accomplice, unless the jury finds that the testimony of an accomplice has been corroborated by other evidence, separate and independent of the evidence given by the accomplice. (R. 518: 519)

Accomplice Wright testified that he had an arrangement with petitioner whereby petitioner would advise Wright of property from Warner Robins Air Materiel Area that petitioner wanted Wright to get for petitioner and that Wright would steal it, deliver it to petitioner, and petitioner would pay Wright for it. (R. 24 - 30).

Petitioner testified that he had no such arrangement or dealing with Wright and committed no criminal act, but that he did have an arrangement with Wright, the arrangement being that Wright, being in a position of employment so to do, would advise petitioner when certain merchandise which petitioner had previously asked Wright to be on the lookout for was being moved to the Surplus Disposition Department of Warner Robins Air Materiel Area, so that petitioner would know about the same and bid accordingly at legal sales of surplus, and know what he was getting (R. 285 - 288).

There was voluminous evidence that sales at the Surplus Department of Warner Robins Air Materiel Area were like buying a "pig in a poke," because the material was placed in big boxes with no clear identification, and a given box would contain most anything, regardless of the identification on the box (R. 167; 173; 200 - 229; 177; 178 - 182; 283.)

By knowing what items were in which box or where they were placed for sale, that he wanted, petitioner would submit a bid commensurate with the items therein, and in most cases would be successful in his bid. (R. 287).

Concerning this admitted arrangement of petitioner with Accomplice Wright, petitioner submitted to the trial court the following timely written request, which was not given, to assure petitioner that the jury would not consider his admitted arrangement a criminal act, authorizing conviction:

> "(4) I charge you that any arrangement that you find the defendant might have had with Mr. A. J. Wright whereby Mr. Wright was to inform the defendant when certain items of merchandise were to be moved or placed for sale by Warner Robins Air Materiel Area, Surplus

Department, could not be considered by you in this case as unlawful, and you would not be authorized to convice the defendant of any such arrangement; any such arrangement would not violate any criminal law that might be involved in this case." (R. 520)

Also, pertaining to this admitted arrangement, and other evidence that merchandise was acquired by petitioner and other dealers from the Surplus Depot at Warner Robins Air Materiel Area contrary to Air Force regulations because of negligence of the Warner Robins Surplus Depot agents and employees, and because it might be considered criminal by the jury, whereas in fact it was not criminal (though maybe unethical, by virtue of petitioner obtaining an advantage over other bidders by knowledge of the contents of the boxes), petitioner submitted the timely written request to charge, which was not given, as follows:

"(5) I charge you that every knowing conversion of property is not stealing, and that there might be knowing conversion of property without intent to defraud. A knowing conversion without intent to defraud is not a crime. Conversion of property may include misuse or abuse of property.

"In this connection, I charge you that if you find the defendant came into possession of the property involved knowing he was unauthorized to have possession of the property, but so came into possession of the property without criminal intent to defraud the United States Government, and thereafter disposed of some of it, if he did dispose of it, without intent to defraud the United States Government, then I charge you that he committed no crime, and his conviction would not be authorized." (R. 521)

Petitioner timely excepted to the failure of the trial court to charge the above five requests to charge, and the trial court ruled as follows:

"By the Court:

I will hear first from the defendant.

Mr. Miller:

Your Honor, the only exception and request that we would have would be that our written requests that have already been submitted, *which Your Honor has considered*, I feel confident that it would be needless for me to pick them up and read those that the Court has not charged. That's not necessary is it, sir? (Emphasis added)

By the Court:

I don't think so. You can just except to all those which I did not give.

Mr. Miller:

That is my intention, sir.

I believe that would be sufficient." (R. 542)

The Circuit Court of Appeals in its opinion brushed aside any merit in the omitted requests to charge and the resulting prejudice to petitioner in the following language:

Appellant did not, pursuant to Rule 30, Federal Rules of Criminal Procedure "even attempt to give the *grounds* for his complaint that the court below had failed to give the instructions that he requested." (Appendix pg. 22)

Petitioner placed his character in issue in the trial of the case, testifying that he was 49 years of age and had never been tried for a criminal offense before, nor indicted or charged with a criminal offense before, nor even arrested before in his life.

The trial court charged the jury on this substantive defense of good character as follows:

"Good character is a positive substantive fact and may of itself be sufficient, if it is proven to exist, to generate in the minds of the jury a reasonable doubt as to the guilt of a defendant. If this jury *should think*, from all the testimony together, that notwithstanding the evidence of good character the defendant nevertheless did what he is charged with doing, then you ought to convict him. *In other words, a jury would not be authorized to acquit because of good*

character. The law contains no provision like that. But *if the jury thinks* the defendant actually committed the offense which he is charged with committing, whether he has good character or not, he ought to be convicted. (Emphasis supplied)" (R. 531)

No exception was taken to this charge at the trial of the case, and exception was taken for the first time in petitioner's motion for new trial filed with the trial court. (R. 551)

As to the exception to this character charge, the Circuit Court of Appeals for the Fifth Circuit held that "no such case is presented here" as to justify the application of Rule 52(b), Federal Rules of Criminal Procedure.

REASONS FOR GRANTING WRIT

A

The applicable portions of Rule 30 are strictly for the benefit of the trial court; and all that is necessary for a party to do is "to make known to the court that the defendant would assert that the court had erred," as was held by the Circuit Court of Appeals for the Second Circuit in the following case:

> "We think that in these circumstances, no waiver of the error resulted from any failure to request a cautionary charge. *The objection previously made amply sufficed to make known to the court that these defendants would assert he had erred.* Fed. Rules Crim. Proc. rule 30, 18 USC. *does not require a lawyer to become a chattering magpie.* (Emphasis supplied)".

U.S. v. Kelinson, 2 *Cir.* 205 *F.* (2*d*) 600, 601, 602

Petitioner, in most emphatic and plain language, made it known to the trial court that he was contending the court had erred when the court stated "you can just except to all those which I did not give," and petitioner's counsel stated in reply "That is my intention, sir."

The Circuit Court of Appeals for the Sixth Circuit has also ruled that all that is required under Rule 30 is for the trial court to be advised of the point involved.

"Rule 51 should be read in conjunction with Rule 46. The purpose of these rules is to inform the trial judge of possible errors, that he may have an opportunity to consider his rulings and if necessary correct them, *and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient.* Sweeney v. United Features Syndicate, 2 Cir., 129 F. 2d. 904; Hall v. Aetna Life Insurance Company, 8 Cir. 85 F. 2d. 447, 451. In our opinion we should consider the objection of the appellant to the instruction given."
Williams v. Powers, 6 Cir., 135 *F. (2d)* 153, 156

As set forth hereinbefore (this petition, page 7), petitioner's counsel in substance offered to point out more explicitly the request excepted to and the grounds of the objections of failure to charge the same, and asked if that was necessary by the question "That is not necessary, is it, sir?" to which the court replied "I don't think so. You can just except to all those which I did not give." Any formal statement of the grounds of objections would have been contrary and repugnant to the court's ruling that no more was necessary to be said.

We submit that it is a conclusive presumption, nothing to the contrary appearing, that, in view of the court's ruling, the court was fully cognizant of petitioner's grounds of objection and applicability of the request to the law and facts and defendant's contention of defenses at the trial, either singly or conjunctively, from discussions of the request, petitioner's opening statement to the jury and petitioner's argument to the jury.

The Circuit Court of Appeals for the District of Columbia, citing as authority a case of this Supreme Court, has held that Rule 30 is for the benefit of the trial court alone:

"In assigning error as to any part of a charge, *or for any omission therefrom*, as for failure to charge in accordance with a request, it is essential that a distinct objection be stated, with the ground upon which it is based. Mundy v. United States, 1949, 85 U.S. App. D.C. 120, 176 F. 2d 32; Felton v. United States, 1948, 83 U.S. App. D.C. 277,

"170 F. 2d 153, certiorari denied 335 U.S. 831, 69 S. Ct. 18, 93 L. Ed. 385; United States v. Sutter, 7 Cir., 1947, 160 F. 2d. 754. *The requirement is for the sound and practical purpose of affording the court an opportunity to make any additions or corrections that may be deemed appropriate before the jury retires to consider of its verdict.* Cf. Palmer v. Hoffman, 1943, 318 U.S. 109, 119, 63 S. Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719; Stillwell v. Hertz Drivurself Stations, 3 Cir. 1949, 174 F. 2d 714, 715 (Emphasis added)".

Villaroman v. United States, D.C. Cir., 184 *F.* (2*d*) 261, 262

It is earnestly submitted that when a trial court rules that *no more need be said* as to objections to its charge, the requirement of Rule 30, Federal Rules of Criminal Procedure, has been fully and completely complied with, as a matter of law, whether complied with as a matter of fact or not.

If this Court should determine that the Circuit Court of Appeals for the Fifth Circuit erred in holding that Rule 30 was not complied with, then there should be determined whether or not the failure of the trial court to charge said requests resulted in such prejudice to the petitioner as to require a new trial.

The first request to charge (page 4 this petition) requested the law that the jury would not be authorized to convict on the testimony of Accomplice Wright *alone*, unless the jury believed his testimony beyond a reasonable doubt.

This charge should have been given because Wright's testimony was *all* the Government had to convict on, and, therefore, this being the only evidence authorizing a conviction, the jury was required to believe it beyond a reasonable doubt.

The Circuit Court of Appeals for the Eighth Circuit has so held:

"Ordinarily the failure of the court to charge that testimony of an accomplice should be received with great caution

is not assignable as error, in the absence of a request so to charge (Citing cases).

"But it is better practice to so instruct in any event, and a refusal to do so when requested is error. We think the instruction asked was a proper one under the circumstances of this case. *Ordinarily, the requirement that the jury should be convinced beyond a reasonable doubt that the testimony of an accomplice is true would be objectionable and would warrant refusal; but in the instant case proof of the sale depended entirely upon the testimony of Josephine West, and unless the jury believed that testimony beyond a reasonable doubt, they could not properly return a verdict of conviction.* (Emphasis supplied)

Lett v. U.S. 8 *Cir.*, 15 *F.* (2*d*) 686

It is very doubtful that the jury would have convicted petitioner if they had been instructed implicitly by the court, as petitioner was entitled to, that before they would be authorized to convict they would have to believe Wright's testimony beyond a reasonable doubt.

The second request (this petition, page 4), deals with the proposition of law that an accomplice is a competent witness but that a jury should not convict on such testimony *alone*, unless the jury believes such testimony, when scanned with extreme care, caution and suspicion, produces the fullest and most positive conviction of the truth, and the jury is convinced beyond a reasonable doubt of the defendant's guilt.

This Court has so ruled in a case quite similar to the instant case:

"But a felon, being also a confessed accomplice, was thus produced by the Government as a witness for the purpose of proving its case against defendant, the witness having, as it would appear in popular language, turned 'state's evidence,' at least so far as to incriminate himself together with defendant. *Without his evidence it would have been difficult if not impossible to convict the defendant.* No reflection is intended or intimated with regard to this action

on the part of the Government. It was wholly within the discretion of its law officers, and their decision ought not to be reviewed by the court. But the evidence of a witness situated as was Lorenz is not to be taken as that of an ordinary witness of good character, in a case whose testimony is generally and prima facie supposed to be correct. On the contrary, the evidence of such a witness ought to be received with *suspicion* and with the *very greatest care and caution,* and ought not to be passed upon by the jury under the same rule governing other and apparently credible witnesses. In many jurisdictions such a man is an incompetent witness unless he has been pardoned. The facts surrounding this case make it particularly important that the rule in regard to material errors should be most rigidly adhered to. (Emphasis supplied)"

Crawford v. U.S., 212 *U.S.* 183, 203

Accomplice Wright testified he had hopes of benefit and leniency because of his testimony when he testified that his telling the truth "should help me some." (R. 59) The facts of this case, like the facts mentioned in the Crawford case last above, make this case one "particularly important that the rule in regard to material errors should be most rigidly adhered to."

The third request (this petition, page 4) deals with the rule of law that testimony of an accomplice should not be given unlimited credence because of its untrustworthiness, without corroboration.

This rule was stated by the Circuit Court of Appeals for the Fourth Circuit in the following case:

"It is the general principle in considering credibility of witnesses that the testimony of an accomplice is open to *suspicion,* or may be actuated by self-interest, and such testimony should be carefully weighed and tested before giving it unlimited credence. As a general principle, it is not safe to accept (it) as conclusive, *unless it is corroborated* by testimony of other persons or facts and circumstances clearly tending to prove it.' " (Emphasis supplied)

Gormley v. U.S., (*4th Cir.*) 167 *F.* (*2d*) 454, 457

The Circuit Court of Appeals for the Fifth Circuit in this case ruled *no corroboration* of the accomplice's testimony was necessary (Appendix this brief, p. 21). This ruling of the Circuit Court is in direct conflict with the following decisions of this Court:

> "It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, *and to require corroborating testimony before giving credence to them*. But no such charge was asked to be presented to the jury by any proper request in the case, and the refusal to grant the one asked for was not error." (Emphasis added)
>
> *Holmgren v. U.S.*, 217 *U.S.* 509, 523. 54 *L. Ed.* 861

The rule requiring corroboration, as announced by the United States Supreme Court, is the rule in the Tenth Circuit.

> "Where conviction is sought on basis of testimony of accomplices, jury should be cautioned that testimony of accomplices must be carefully scrutinized, weighed with great caution, and that too much reliance should not be placed upon it unless corroborated. (Citing many cases):
>
> *Johns v. U.S.*, (10*th Cir.*) 227 *F.* (2*d*) 374 (2)

The fourth request (this petition, p. 5) presented the vital defense of the defendant that his admitted arrangement with Wright was not criminal and that this arrangement alone would not authorize a conviction.

The absence of this charge to the jury allowed the jury to convict on the admitted arrangement, which was not criminal.

This Court has ruled that a defendant is entitled to a full charge on his defenses and the law relating thereto as applied to the evidence of the case:

> "It is well settled the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal. The numerous decisions to this effect are cited in Wharton on Criminal Law, vol 3, sec. 3162, 7th ed. The chief object contem-

plated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved."

Bird v. U.S., 180 *U.S.* 356, 361

The Circuit Court of Appeals for the Fifth Circuit has itself so ruled in two cases:

"Where evidence presents a theory of defense and the court's attention is particularly directed to it, it is reversible error to refuse to give *any* charge on such theory. (Emphasis supplied)"

Calderon v. U.S., (*5th Cir.*) 279 *F.* 556 (Citing 180 U.S. 356, 361

"Defendants are indeed entitled to have presented to the jury, by appropriate instructions, their defensive theories which are supported by the evidence in the case, and failure to submit them when properly requested may constitute reversible error."

Jenkins v. U.S., (*5th Cir.*) 59 *F.* (2*d*) 2, 3

The fifth request (this petition, p. 6) presents the proposition of law announced by this Court in the case of *Morissette v. U.S.* 342 *U.S.* 246, 96 *L. Ed.* 288, that every knowing conversion is not necessarily a criminal conversion.

The evidence was voluminous that at surplus sales at the Surplus Department of Warner Robins Air Materiel Area many items were sold contrary to Air Force Regulations, with knowledge by the buyers of the surplus, including petitioner, due to negligence and carelessness of Air Force personnel. (R. 167; 173; 200 - 229; 177; 178 - 182; 283)

This may amount to civil law conversion, but does not amount to a criminal act of conversion. This charge was also applicable to the admitted arrangement defendant had with Wright, and illegally permitted the jury to convict on such evidence not authorizing a conviction.

"Knowing conversion within the meaning of 18 USC, Section 641, requires more than knowledge that the defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion . . . .
" . . . . It is not difficult to think of intentional and knowing abuses and unauthorized uses of Government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining . . . . "

Morissette v. U.S., 342 *U.S.* 246, 96 *L. Ed.* 288

B.

The charge of the trial court on the defense of good character (this petition, p. 7) was erroneous, for it did not authorize in any way evidence of good character *alone* to raise a reasonable doubt of the guilt of petitioner, as this Court, the Fifth Circuit Court and other Circuit Courts have held was the rule.

"Whatever may have been said in some of the earlier cases, to the effect that evidence of good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue *would alone create a reasonable doubt*, although without it the other evidence would be convincing." (Emphasis added)

Edington v. U.S., 164 *U.S.* 361, 366.

The same rule prevails in the following Circuits:

Second Circuit: *U.S. v. Quick*, 128 *F.* (2*d*) 832

Third Circuit: *U.S. v. Klass et al.*, 166 *F.* (2*d*) 373

It is also the rule announced by the Fifth Circuit in the case of *Holland v. U.S.*, 245 *F.* (2*d*) 341:

In a Seventh Circuit case a charge almost identical with the effect of the charge in the instant case was held reversible error.

In our case the trial court charge: "In other words, the jury would not be authorized to acquit because of good character." In the Seventh Circuit case mentioned the trial court charged: "However, the mere fact that a defendant may have had a good reputation prior to this time should not be used by you as an excuse to acquit him in this case." In that case the Circuit Court of Appeals for the Seventh Circuit held:

> "Certainly the latter portion of the charge if standing alone is erroneous. *That admonition to the jury makes the use of good character evidence meaningless.* It would be an empty gesture if it could not be considered by the jury and utilized in a proper case for the purpose of acquittal . . . But such evidence could be used as an excuse (we think 'reason' is a better word) for a verdict favorable to the defendant." (Emphasis supplied)

U.S. v. Semenuik, (*7th Cir.*) 193 *F.* (*2d*) 508-509

Was the erroneous charge on character evidence "a plain error affecting substantial rights" of petitioner, to be noticed on appeal pursuant to Rule 52 (b), Federal Rules of Criminal Procedure?

The gravity of this erroneous charge on good character is set forth in a quite similar case from the Third Circuit:

> "It is especially appropriate that the jury be adequately instructed with respect to character evidence where, as here, the evidence against the defendant consists entirely of testimony of self-confessed accomplices. See *Egan v. United States,* 52 *App. D.C.* 384, 287 *F.* 958, 968, 969, and *Jones v. United States,* 53 *App. D.C.* 138, 289, *F.* 536, 539. In *Nanfito v. United States,* 8 *Cir.,* 20 *F. 2d* 376, 379, the court said that 'It should be observed that in a case in which the government relies chiefly for its prosecution upon the evidence of admitted accomplices . . . *it is important that the jury be specifically instructed as to the proper consideration*

to be given evidence of good character.' (Emphasis supplied)"

U.S. v. Quick, (*3rd Cir.*) 128 *F.* (*2d*) 832, 835, 836

This Court has set forth the rule that, particularly in criminal cases, errors regarding the fairness of a trial will be so noticed.

"In exceptional circumstances, *especially in criminal cases,* appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious or if they otherwise seriously affect the *fairness,* integrity or public reputation of judicial proceedings. (Emphasis supplied)"

U.S. v. Atkinson, 297 *U.S.* 157, 56 *S. Ct.* 391, 392, 80 *L. Ed.* 555

C.

Summary of Conflict of Decisions

(1) The decision of the Circuit Court of Appeals for the Fifth Circuit in this case that Rule 30, Federal Rules of Criminal Procedure was not complied with is in conflict with the following decisions:

U.S. v. Kelinson, (*2nd Cir.*) 205 *F.* (*2d*) 600

Williams v. Powers, (*6th Cir.*) 135 *F.* (*2d*) 153

Villaroman v. U.S., (*Dist. of Columbia*) 184 *F.* (*2d*) 261

(2) The decision of the Circuit Court of Appeals for the Fifth Circuit that an accomplice's testimony needs no corroboration is in conflict with the following decisions:

Gormley v. U.S., (*4th Cir.*) 167 *F.* (*2d*) 454

Holmgren v. U.S., 217 *U.S.* 509, 54 *L. Ed.* 861

Johns v. U.S., (*10th Cir.*) 227 *F.* (*2d*) 374

(3) The decision of the Circuit Court of Appeals for the Fifth Circuit that the erroneous charge on good character evidence cannot be noted under Rule 52 (b) is in conflict with:

U.S. v. Quick, (*3rd Cir.*) 128 *F.* (*2d*) 832

U. S. v. Atkinson, 297 *U.S.* 157, 56 *S. Ct.* 391, 392, 80 *L. Ed.* 555

U.S. v. Semenuik, (*7th Cir.*), 193 *F.* (*2d*) 508

U.S. v. Klass, (*3rd Cir.*) 166 *F.* (*2d*) 373

CONCLUSION

It is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Wallace Miller, Jr., certify that I am the attorney of record for petitioner and I am a member of the Bar of the Supreme Court of the United States.

That on the _____ day of February, 1958, I served copies of the foregoing and attached petition for writ of certiorari, and appendix thereto attached, as follows:

(1) On the United States of America, by air mailing a copy in a properly addressed envelope, with sufficient first-class air mail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D.C.

(2) On the United States of America, by mailing a copy in a properly addressed envelope, with sufficient first-class postage prepaid, to Hon. Frank O. Evans, United States Attorney in and for the Middle District of Georgia, at his office in Room 303, United States Post Office and Courthouse Building, Macon, Georgia.

This certificate is made in compliance with the requirements of Rule 33, Revised Rules of the Supreme Court of the United States.

WALLACE MILLER, JR.

APPENDIX

OPINION
IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 16320

JOSEPH TOMLEY,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(December 26, 1957.)

Before HUTCHESON, Chief Judge, and BORAH and CAMERON, Circuit Judges.

BORAH, Circuit Judge: The appellant, Joseph Tomley, and one Andrew Jackson Wright were indicted for conspiracy to violate 18 U.S.C. Sec. 641 and both of them were also charged with various substantive offenses including violations of the same law. Wright pleaded guilty to all counts against him. Appellant went to trial before a jury and was found guilty only of conspiracy as charged in Count One of the indictment and was sentenced thereon to imprisonment for a term of three years.

Appellant's appeal is based upon (1) certain portions of the judge's charge to the jury; (2) the court's refusal to give in charge to the jury defendant's eight requested instructions; and (3) the insufficiency of the evidence to support the jury verdict.

Appellant's first and third specifications of error which have to do respectively with the court's charge in relation to character evidence and to the illustrations used by the court in defining the offense of conspiracy are patently without substance. Criminal Procedure Rule 30, 18 U.S.C.,[1] providing that no party may assign as error the giving of or failure to give an instruction unless he objects thereto, stating distinctly the matter to which he objects and the grounds of his objection, has the force of law. Under that rule, in order to put the trial court in error, it is necessary that the defendant precisely state the grounds of his objection and that the grounds stated point out an error prejudicial to the defendant. *Estep v. United States*, 5 Cir., 223 F.2d 19, 22. The defendant did not do this here, and consequently, we are not required to consider specifications one and three. While it is true that in extraordinary circumstances we may, on our own motion, notice errors to which no exception has been taken,[2] if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings, a careful examination of the record convinces us that no such case is presented here.

With respect to the second specification of error, appellant contends that the District Judge erred in instructing the jury as follows:

> "I charge you in this connection that he is an alleged accomplice, and that you should in considering the testimony of an alleged accomplice, his testimony should be scanned

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1 Rule 30, Federal Rules of Criminal Procedure. "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.* Opportunity shall be given to make the objection out of the hearing of the jury." (Emphasis added.)

2 Rule 52(b) provides that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Cf. Lash v. United States*, 1 Cir., 221 F.2d 237, and *Horne v. United States*, 5 Cir., 246 F.2d 83, 86.

with great care and received with great caution, and I charge you that the jury should consider all of the facts and circumstances in the case and if by reason of the fact that he is an accomplice you would not be willing to accept any part of his testimony, then you would be authorized to disregard it. On the other hand if you think under all of the facts and circumstances of this particular case that what the alleged accomplice testitified to was true, then you would be authorized to act on his evidence and to convict on it."

With reference to this same subject matter error is also assigned to the court's failure to charge five written requests with respect to the testimony of an accomplice including the patently erroneous request that "a jury should not place too much reliance on the testimony of an accomplice, unless the jury finds that the testimony of an accomplice has been corroborated by other evidence, separate and independent of the evidence given by the accomplice." See *Burton v. United States,* 5 Cir., 175 F.2d 961; cert. denied 338 U.S. 909.

It appears that at the close of the testimony the defendant presented a number of written instructions, and asked the court to give them to the jury. At the conclusion of the court's charge counsel for the defendant made the following statement: "Your Honor, the only exception and request that we would have would be that our written requests that have already been submitted, which Your Honor has considered, I feel confident that it would be needless for me to pick them up and read those that the Court has not charged." Nothing however by way of objection was made to the court's charge, which on the subject of accomplice testimony was lacking in any statement equivalent to that in the rejected instructions. In his objection, counsel for defendant merely restated his requests, but did not even atempt to give the *grounds* for his complaint that the court below had failed to give the instructions that he had requested. Hence, there was a failure to comply with Rule 30 of the Federal Rules of Criminal Procedure which in part provides that: "No party may assign as error any *portion* of the charge or *omission* therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to

which he objects *and the grounds of his objection.*"[3] This being so, and there being no prejudicial error[4] in the courts failure to give the requested charges, appellant may not now complain of their refusal.

Similarly, and for the same reasons appellant is in no position to complain of the court's refusal to give requested instructions No. 4(f), (g), and (h). However, we have considered these specifications of error and find no merit in them.

In No. 4(f) the instruction requested was as follows:

> "I charge you that any arrangement that you find the dedefendant might have had with Mr. A. J. Wright whereby Mr. Wright was to inform the defendant when certain items of merchandise were to be moved or placed for sale by Warner Robins Air Material Area, Surplus Department, could not be considered by you in this case as unlawful, and you would not be authorized to convict the defendant of any such arrangement; any such arrangement would not violate any criminal law that might be involved in this case."

Appellant contends that the failure of the court to charge this request "illegally permitted the jury, under the general charge of the court as to an agreement under a conspiracy charge, to conclude that this simple arrangement that appellant admitted he had with Wright constituted an 'agreement' which would satisfy the agreement requirements of the conspiracy count." We think that appellant's contention is more fanciful than real and that no prejudice resulted from the failure to give this charge for the reason that the court's charge when considered as a whole was eminently fair and fully protected the rights of appellant. As to the conspiracy count the court instructed the jury in part as follows:

> "Now this indictment, which, as I said, you can read throughout if you want to, charges in substance that these two defendants Wright and Tomley, conspired among themselves and with other persons to the Grand Jurors un-

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3 Emphasis supplied throughout.

4 See Rule 52(b), Federal Rules of Criminal Procedure, note 2 *supra*.

known, and therefore unnamed, to do certain things, namely to steal, purloin and knowingly convert to their own use, and without authority to sell, convey and dispose of property of the United States, to wit: Scintilla breaker assemblies having platinum points thereon, American-Bosch breaker point springs having platinum points, motor gun chargers, sometimes described as motor timer guns, and aircraft spark plugs having platinum points, having a value of at least $6,800.00; and to receive, conceal, and retain such property with intent to convert it to their own use and gain, knowing that said property had been and would be so stolen, purloined and converted."

In this connection the jury was instructed that they should first determine "whether or not there was an agreement among or between two or more persons, and whether or not the defendant Joseph Tomley was a party to that agreement *as alleged in the indictment*. If there was no such understanding then you would just find a verdict of not guilty on Count One." And if more need be said to demonstrate the fallacy and unreasonableness of appellant's contention we shall be content to close the discussion on this branch of the case by quoting the following additional paragraph from the court's charge:

"When I use the word 'agreement' I mean an agreement to violate the law as set out in this indictment. Of course there are a great many laws and a great many crimes under the various statutes and the conspiracy statute applies to an agreement to violate any criminal law of the United States no matter what it is. But this indictment says that these defendants agreed or had an understanding among themselves that they would violate the laws of the United States in certain respects set out here in the indictment. *I charge you, therefore, that the agreement or understanding must be an agreement to violate the law in the respect set out in this indictment itself*, that is in Count One, and in the long or first or charging part of Count One."

In No. 4(g) the charge requested was: "I charge you that before you would be authorized to find the defendant guilty

of any count in the indictment you must be satisfied to a moral and reasonable certainty, and beyond a reasonable doubt, that the defendant committed the acts charged against him, and intended by such acts to defraud the United States of America." This request might properly have been given, but the court was not obliged to accept the language suggested by counsel in framing its instructions to the jury. And appellant cannot justifiably complain where as here the request in substance was given in charge. The court (1) fully instructed the jury as to the essential elements of the crime of conspiracy which must be proved and established in order to warrant a conviction; (2) charged the jury "that in all of the counts involved in the indictment, one, two and three, a necessary element of each offense charged in the counts is criminal intent on the part of the defendant to defraud the United States of America." (3) instructed the jury that in a criminal case it is the duty and burden of the government to prove the charge that it brings against a defendant beyond a reasonable doubt; and (4) defined accurately and in some detail the term "reasonable doubt."

In No. 4(h) appellant claims that the court committed reversible error in failing to charge the following requested charge:

> "I charge you that every knowing conversion of property is not stealing, and that there might be a knowing conversion of property without intent to defraud. A knowing conversion without intent to defraud is not a crime. Conversion of property may include misuse or abuse of property.
>
> "In this connection, I charge you that if you find the defendant came into possession of the property involved knowing he was unauthorized to have possession of the property, but so came into possession of the property without criminal intent to defraud the United States Government, and thereafter disposed of some if it, if he did dispose of it, without intent to defraud the United States Government, then I charge you that he committed no crime, and his conviction would not be authorized."

Appellant argues that inasmuch as the evidence shows that he bought property from Warner Robins Air Material Area at advertised sales, with knowledge, actual or implied, that certain items were being offered for sale and sold inadvertently, or through negligence or error, the court's failure to charge the requested charge deprived appellant of a substantial defense and the benefit of a correct and applicable rule of law pertinent to the case. It may well be doubted whether the request as framed was sufficient to put the court on notice of the point which appellant now for the first time makes on appeal in view of the fact that the charge was general in scope and that appellant was not charged in Counts Two and Three, on which he was acquitted, with the substantive offense of knowingly converting property of the United States to his own use, but with the substantive offenses of receiving, concealing and retaining government property in violation of 18 U.S.C. Sec. 641. But the charge of the court covered the entire case and it was reasonably complete, fairly accurate, and sufficiently covered all of the material issues in the case. As we pointed out above, the court specifically charged that in all of the counts involved, a necessary element of each offense charged is "criminal intent on the part of the defendant to defraud the United States of America." And in the succeding paragraph, the court instructed the jury that even if it might find that the "defendant might have come into possession of the property illegally so far as the civil law might be concerned, that is got it without getting a good title to it, this alone, if that is all you find, would not place the property in his hand whereby he would be violating any law in so receiving the property and selling it." In any event, if the charge in any respect fell short of presenting Tomley's defense, it was, not such a falling short as defendant can, in view of Rule 30 and Rule 52(a), Harmless Error and Plain Error, Federal Rules of Criminal Procedure, 18 U.S.C., here complain of it. *Isgate v. United States*, 5 Cir., 174 F.2d 437, 438.

Finally, appellant claims that the verdict is not supported by substantial evidence, and is contrary to the weight of the evidence. The short answer to this contention is that the appellant as in *Ansley v. United States*, 5 Cir., 135 F.2d 207, moved for

a judgment of acquittal at the close of the Government's case, but thereafter introduced evidence in his own behalf and failed to renew his motion at the close of all the evidence. "The failure to renew operated to waive the benefit of the motion made and the question of the sufficiency of the evidence was not properly saved for review by this court."

We have considered all other contentions of counsel and find them wholly without merit. The judgment appealed from is therefore affirmed.

AFFIRMED.